LEASING CORPORATION SDN BHD A

v.

INDAH LESTARI SDN BHD

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
ZULKEFLI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-982-2005]
18 SEPTEMBER 2007 C

CIVIL PROCEDURE: *Injunction - Setting aside - Affidavits filed in support of application for injunction - Whether ought to be struck out - Fresh evidence, admissibility of - Whether no legal basis to support application for injunction* D

EVIDENCE: *Fresh or further evidence - Admissibility of - Principles applicable - Reasonable diligence - Determining influence upon decision of subordinate court*

CIVIL PROCEDURE: *Affidavits - Affidavits in support of application for injunction - Whether defective - Whether ought to be struck out* E

This was an appeal by the defendant against the decision of the High Court allowing the plaintiff's application for an injunction against the defendant preventing it or any of its agents from F selling, disposing or transferring certain shares that were lodged with the defendant as collateral security for loans given by the defendant to the plaintiff pursuant to several loan agreements entered into between the parties. The defendant also applied by way of notice of motion ('encl. (18a)'), seeking leave of this court G to admit and consider in the appeal new evidence as contained in certain exhibits. It was contended that the documents in the said exhibits were not made available to the defendant at the material time, and reasonable diligence would not have made it so available because the defendant was misled into believing that one Ismail H Ahmad ('Ismail') from the plaintiff's company was not an undischarged bankrupt. Ismail was the sole deponent to the plaintiff's affidavits filed in support of the plaintiff's application for the injunction against the defendant. In his affidavits, he claimed that he was then a corporate advisor, a former director and a I shareholder of the plaintiff and was given authority to act for the

plaintiff. The defendant contended that the affidavits filed in support of the plaintiff's application for the injunction ought to be struck out as they were defective and invalid and should have been disregarded at the hearing before the High Court.

Held (allowing the appeal, and setting aside the injunctive orders granted by the High Court)
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) Ismail, being an undischarged bankrupt since 4 March 2002, must at the time of affirming an affidavit disclose his incapacity with regard to his status as an undischarged bankrupt to the attention of the court. He, however, never made any disclosure as to his status in the affidavits he affirmed for and on behalf of the plaintiff. Neither the plaintiff nor its solicitors informed this fact to the defendant or its solicitors at any point in time. There was also nothing from the pleadings, affidavits and exhibits filed by the plaintiff to even remotely suggest that Ismail was an undischarged bankrupt. The defendant only got to know of Ismail's bankrupt status in early May 2007 when it conducted a bankruptcy search with the Insolvency Department on 9 May 2007. The defendant had, thus, fulfilled the first condition of its entitlement to bring in new evidence at the hearing of the appeal. This was because even though the said evidence would have been available at the material time, reasonable diligence would not have made it so available. At that point of time, the defendant could not know or appreciate its relevance due to the plaintiff and/or Ismail misleading the defendant into believing that he was not an undischarged bankrupt. (paras 3 & 4)

(2) Also, the new evidence that the defendant sought to admit would have had or would have likely have had a determining influence upon the decision of the High Court. Ismail's failure to disclose that he was a bankrupt indicated a lack of *bona fides* both on his and the plaintiff's part. This was especially more important as the plaintiff was applying for an injunction, where full and frank disclosure is required and parties applying for such a remedy are to come to court with clean hands. Furthermore, s. 125(1) of the Companies Act 1965 provides that a person who is an undischarged bankrupt and acts as

director of a company shall be guilty of an offence. Therefore, at the material time, Ismail was in breach of this provision and faced a penalty of imprisonment for five years or a fine of RM100,000, or both. Therefore, the defendant's application in encl. (18a) was allowed. (paras 5 & 9)

(3) As a bankrupt, Ismail had no capacity to affirm an affidavit on behalf of the plaintiff, and his averment pertaining to the plaintiff was inadmissible and could not be relied upon. As a result, the affidavits affirmed by the plaintiff in the High Court were invalid and should have been disregarded at the hearing in the High Court. The affidavits were accordingly struck out. The fact remained that Ismail was the sole deponent to the plaintiff's affidavits and it became apparent that the plaintiff had no longer any legal basis to support its application for the injunction against the defendant. (paras 6 & 10)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan plaintif untuk mendapatkan injunksi terhadap defendan bagi menghalang defendan atau agen-agennya dari menjual, melupuskan atau memindahkan saham-saham tertentu yang diletakkan kepada defendan sebagai jaminan kolateral kepada pinjaman-pinjaman yang diberikan oleh defendan kepada plaintif di bawah beberapa perjanjian pinjaman yang dimeterai di antara mereka. Melalui satu notis usul ('lampiran (18a)'), defendan juga memohon kebenaran mahkamah untuk menerima-masuk dan menimbang keterangan-keterangan baru dalam rayuan ini, seperti yang terkandung dalam beberapa eksibit tertentu. Ianya dihujahkan bahawa dokumen-dokumen di dalam eksibit-eksibit tersebut telah tidak didedahkan kepada defendan pada waktu material, dan keperihatinan munasabah tidak mampu untuk mendedahkan dokumen-dokumen berkenaan oleh kerana defendan telah diperdaya untuk mempercayai bahawa seorang Ismail Ahmad ('Ismail') dari syarikat plaintif bukan seorang bankrap yang belum dilepaskan. Ismail adalah deponen tunggal afidavit-afidavit yang difailkan plaintif bagi menyokong permohonan injunksinya terhadap defendan. Dalam afidavit-afidavitnya, Ismail mendakwa bahawa beliau pada masa itu adalah penasihat korporat, bekas pengarah dan seorang pemegang saham plaintif dan diberi mandat untuk bertindak bagi pihak plaintif. Defendan mengatakan bahawa afidavit-afidavit yang difailkan bagi menyokong permohonan injunksi

plaintif perlu dibatalkan, kerana ia adalah cacat dan tak sah dan sepatutnya tidak diendahkan semasa pendengaran di hadapan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan dan mengenepikan perintah injunksi yang diberi oleh Mahkamah Tinggi)
Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Ismail, sebagai seorang bankrap yang belum dilepaskan sejak 4 Mac 2002, semasa mengikrarkan afidavit-afidavitnya, hendaklah mendedahkan kecacatan statusnya sebagai seorang bankrap yang belum dilepaskan kepada mahkamah. Beliau bagaimanapun tidak membuat apa-apa pendedahan mengenai statusnya itu dalam afidavit-afidavit yang diikrarkan untuk dan bagi pihak plaintif. Begitu juga, plaintif dan peguamcara plaintif tidak pada bila-bila masa pun memberitahu defendan atau peguamcara defendan mengenai fakta ini. Juga tidak terdapat apa-apa di dalam pliding, afidavit dan eksibit yang difailkan oleh plaintif yang memberi imbasan bahawa Ismail adalah seorang bankrap yang belum dilepaskan. Defendan hanya mengetahui tentang status kebankrapan Ismail pada awal Mei 2007, iaitu apabila ia melakukan carian kebankrapan di Jabatan Insolvensi pada 9 Mei 2007. Defendan dengan itu telah memenuhi syarat pertama keperluan untuk membawa masuk keterangan baru di pendengaran rayuan. Ini kerana, walaupun keterangan tersebut boleh diperolehi pada waktu material, keperihatinan yang munasabah tidak mampu untuk mendapatkannya. Pada masa itu, defendan tidak mungkin tahu atau menyedari tentang kerelevanannya kerana plaintif dan/atau Ismail telah memperdaya defendan untuk mempercayai bahawa Ismail bukan seorang bankrap yang belum dilepaskan.

(2) Juga, keterangan baru yang hendak dibawa masuk oleh defendan mempunyai atau berkemungkinan mempunyai kesan penentuan terhadap keputusan Mahkamah Tinggi. Kegagalan Ismail mendedahkan bahawa ia seorang bankrap menunjukkan ketiadaan *bona fides* di pihaknya dan di pihak plaintif. Ini secara khususnya adalah penting, kerana plaintif memohon untuk mendapatkan injunksi di mana pendedahan yang ikhlas dan sepenuhnya adalah diperlukan dan pihak yang memohon remedi sedemikian hendaklah datang ke mahkamah dengan tangan yang bersih. Selain itu, s. 125(1) Akta Syarikat 1965

memperuntukkan bahawa seorang bankrap yang belum dilepaskan yang menjadi pengarah sesebuah syarikat telah melakukan satu kesalahan. Oleh itu, pada waktu material, Ismail telah melanggar peruntukan ini dan boleh dihukum penjara selama lima tahun atau denda RM100,000, atau kedua-duanya sekali. Oleh yang demikian, permohonan defendan di dalam lampiran (18a) adalah dibenarkan.

(3) Sebagai seorang bankrap, Ismail tidak mempunyai kapasiti untuk mengikrarkan afidavit-afidavit bagi pihak plaintif, dan pengataan-pengataannya berkaitan dengan plaintif tidak boleh diterima-masuk atau diambil sebagai keterangan. Akibatnya adalah bahawa afidavit-afidavit yang diikrarkan oleh plaintif di Mahkamah Tinggi adalah tak sah dan tidak harus diendahkan semasa pendengaran di Mahkamah Tinggi. Afidavit-afidavit tersebut dengan itu adalah dibatalkan. Oleh kerana Ismail adalah satu-satunya deponen bagi afidavit-afidavit plaintif, maka plaintif sudah tidak lagi mempunyai sebarang asas undang-undang untuk menyokong permohonan injunksinya terhadap defendan.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

Ooi Bee Tat Development Sdn Bhd v. Ooi Bee Tat [1985] 1 CLJ 449; [1985] CLJ (Rep) 615 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 125(1)
Courts of Judicature Act 1964, s. 69
Rules of the Court of Appeal 1994, r. 7(3A)

For the appellant - Fahri Azzat (Izzat Othman & Audrey Quah with him); M/s Azzat & Izzat
For the respondent - CK Yeoh (Sarjeet Sidhu with him); M/s Sidhu & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-680-2005]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

[1] This is an appeal by the defendant against the decision of the High Court at Kuala Lumpur which allowed the plaintiff's application for an injunction against the defendant preventing

them, or any of their agents from selling, disposing or transferring the 452,000 Ayer Molek Rubber Company Berhad shares ("AMR shares") that were lodged with the defendant as a collateral security for the loans given by the defendant to the plaintiff pursuant to several loan agreements entered into between the parties.

[2] Before we proceed to hear the appeal we shall first deal with the defendant's application filed by way of notice of motion ("encl. 18a") seeking leave of this court to admit and consider in the appeal the new evidence as contained in exhs. "JY1", "JY2", "JY3", "JY4", "JY5" and "JY7" ("the said exhibits"). Under the provisions of s. 69 Courts of Judicature Act 1964 and r. 7(3A) of the Rules of the Court of Appeal 1994, new or fresh evidence may be admitted during the hearing of the appeal provided two conditions are fulfilled which are as follows:

(a) at the hearing before the High Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[3] It is the contention of the defendant that the documents in exhs. "JY1", "JY2", "JY3", "JY4", "JY5" and "JY7" were not made available to the defendant at the material time and reasonable diligence would not have made it so available because the defendant was misled into believing that a person by the name of Ismail bin Ahmad ("Ismail") from the plaintiff's company was not an undischarged bankrupt. Ismail was the sole deponent to the plaintiff's affidavits filed in support of the plaintiff's application for the injunction against the defendant. Ismail in his affidavits filed claimed that he was then a corporate advisor, a former director and a shareholder of the plaintiff and was given authority to act for the plaintiff. We agree with the contention of the defendant that Ismail being an undischarged bankrupt since 4 March 2002 must at the time of affirming an affidavit disclose his incapacity with regard to his status as an undischarged bankrupt to the attention of the court. The plaintiff is legally bound to make a full and frank disclosure of all material facts since in an application for an injunction it must be made with utmost good faith or *uberrimae*

fidei (See the case of *Ooi Bee Tat Development Sdn Bhd v. Ooi Bee Tat* [1985] 1 CLJ 449; [1985] CLJ (Rep) 615). However, in this case Ismail never made any disclosure as to his status in the affidavits he affirmed for and on behalf of the plaintiff. Neither the plaintiff nor the plaintiff's solicitors informed this fact to the defendant or its solicitors at any point in time. There is also nothing from the pleadings, affidavits and exhibits filed by the plaintiff to even remotely suggest that Ismail was an undischarged bankrupt. Furthermore the defendant contended that there did not appear to be any action taken against Ismail either by the Companies Commission of Malaysia or Insolvency Department which reinforced the defendant's belief at that particular time that there was nothing unusual with regard to Ismail's legal status.

[4] The defendant only got to know of Ismail's bankrupt status in early May 2007 when it conducted a bankruptcy search with the Insolvency Department on 9 May 2007. It is our view that the defendant has fulfilled the first condition of its entitlement to bring in new evidence at the hearing of the appeal. This is because even though the said evidence would have been available at the material time, reasonable diligence would not have made it so available. At that point of time the defendant could not know or appreciate its relevance due to the plaintiff and/or Ismail misleading the defendant into believing that he was not an undischarged bankrupt.

[5] We also find that the new evidence sought to be admitted by the defendant would have had or would have been likely to have had a determining influence upon the decision of the High Court. Exhibit "JY1" is a document issued by the Insolvency Department of Malaysia. This would prove that Ismail was a bankrupt and his non-disclosure of this fact would reflect on his trustworthiness and the credibility of his evidence in the affidavits he affirmed for and on behalf of the plaintiff. As a bankrupt Ismail was by law required to disclose this material fact. His failure to do so indicates a lack of *bona fide* both on his and the plaintiff's part. This is especially more important as the plaintiff was applying for an injunction where full and frank disclosure is required and parties applying for such a remedy are to come to court with clean hands. Furthermore s. 125(1) Companies Act 1965 provides that a person who is an undischarged bankrupt and acts as director of a company shall be guilty of an offence. At the material time

A therefore Ismail was in breach of this provision and faced a penalty of imprisonment for five years or a fine of RM100,000 or both.

[6] As a bankrupt Ismail had no capacity to affirm an affidavit B on behalf of the plaintiff and his averment pertaining to the plaintiff is inadmissible and cannot be relied upon. (See the case of *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606). As a result of this, we are of the view the affidavits affirmed by the plaintiff in C the High Court are invalid and should have been disregarded at the hearing in the High Court.

[7] Exhibit "JY2" is a company search on Ayer Molek Rubber Company Berhad. Exhibits "JY3" and "JY4" are its annual reports for the years 2002 and 2005 respectively. All these three exhibits D showed Ismail acting as a director of the company and these documents prove that Ismail was in flagrant breach of s. 125(1) Companies Act 1965. Being an undischarged bankrupt, Ismail cannot be acting as a director of Ayer Molek Rubber Company Berhad. Exhibit "JY5" comprises of two letters both dated 10 May E 2007 sent by the defendant's solicitors notifying the Companies Commission of Malaysia and the Insolvency Department, Malaysia respectively of Ismail's activities despite his bankrupt status. These letters could not have been with reasonable diligence produced and submitted to the court earlier since these letters could only F be written by the defendant after the defendant discovered Ismail's status as a bankrupt on 9 May 2007.

[8] Exhibit "JY7" is the announcement under the Listing Circular No. L/Q 43752 of 2007 by Ayer Molek Rubber Company Berhad G to Bursa Malaysia Securities Berhad ("Bursa Securities") dated 1 June 2007 announcing its imminent delisting from the Official List of Bursa Securities. The significance of the inclusion of this announcement to Bursa Securities is to show the fact that at the High Court in the application for the injunction Ismail had H deposed in his affidavit that the plaintiff had a good reputation and that if the defendant were allowed to sell the 452,000 AMR shares that it held as security for the loan given to the plaintiff, then it would give a negative impression of the plaintiff and would ruin its reputation in the commercial world. Ismail had also further I deposed that to sell those AMR shares would also cause the price to fall because it was such a large block. This announcement to

Bursa Securities is evidence of a subsequent event that took place which showed Ismail's belief at the time he deposed the content of his affidavit supporting the application for the injunction to be completely without basis. It is our view if the true factual circumstances were made available to the learned judge of the High Court it is likely that the learned judge may have come to a different conclusion as the value of the security of the AMR shares had fallen considerably from a value of about RM20 per share to not being traded on the Bursa Securities at all. The defendant cannot now realize its security and has therefore been prejudiced greatly by the said injunction obtained by the plaintiff.

[9] For the above stated reasons we allowed the defendant's application in encl. (18a) and made an order in terms of the defendant's application.

[10] Having allowed the defendant's application in encl. (18a) learned counsel for the defendant applied to us to strike out the affidavits of Ismail filed in support of the plaintiff's application for the injunction on the ground that the affidavits are defective and invalid and should have been disregarded at the hearing before the High Court. We accordingly struck out the said affidavits. The fact remains that the affidavits of the plaintiff were deposed by the sole deponent, Ismail and it would become apparent now that the plaintiff has no more legal basis to support its application for the injunction against the defendant. We have no other alternative but to allow the defendant's appeal. The injunctive orders granted by the learned judge of the High Court are hereby set aside. We also make an order of a sum of RM2,000 to be paid by the plaintiff to the defendant as costs of the proceedings in this appeal and the deposits to be refunded to the defendant.